No. 89-186

In the Supreme Court of the United States

October Term, 1989

COMMUNITY ELECTRIC SERVICE
OF LOS ANGELES, INC.,

Petitioner,

v.

NATIONAL ELECTRICAL CONTRACTORS
ASSOCIATION, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents identified hereinafter respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's judgment in this case, reported at 869 F.2d 1235.[1]

DECISIONS BELOW

The petition attaches the relevant opinion and other orders of the Court of Appeals, but not of the district

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[1]This Brief in Opposition is submitted on behalf of seven of the nine defendants in the proceedings below. Two defendants will be filing a separate brief.

court. Accordingly, the district court's order granting summary judgment, entered August 6, 1987, is set out in Appendix A to this brief. The judgment entered on that same date is set out in Appendix B.

STATUTORY PROVISIONS INVOLVED

The petition does not set out all of the California statutory provisions which are pertinent to the Questions Presented. California Revenue and Taxation Code, sections 23301, 23303, 23305, 23305a and 23305b are set forth in Appendix C to this brief.

STATEMENT OF THE CASE

These respondents believe a more complete statement of the case is necessary because petitioner's statement is inaccurate, incomplete and misleading.

A. Nature of Action and Proceedings Below.

The petitioner and plaintiff below, Community Electric Service of Los Angeles, Inc. ("CES"), commenced the instant action on January 13, 1986, suing all of the respondents for alleged violations of the Sherman Act (15 U.S.C. §§1, 2), along with various other claims. [Complaint, CR 1]

CES was organized as a corporation under the laws of the State of California in 1976. [Petition, p.4] At the time the complaint was filed, CES's corporate powers, rights and privileges had been suspended continuously since July 1, 1983, in accordance with California Revenue and Taxation Code, §§23301 and 23303 [Appendix, pp.A3,C1], for non payment of corporate franchise taxes. By virtue of such suspension, CES did not have the capacity to sue or be sued under California law when it filed this action. Accordingly, under the express provisions of Rule 17(b) of the Federal Rules

of Civil Procedure, CES also lacked capacity to sue in federal court. [Pet., pp. App. 33-36][2]

In their answers to the complaint, filed in March and April, 1986, respondents specifically alleged CES's lack of capacity to sue. [Pet., p. App. 33; CR 4-7, 10]

In mid-April 1987, respondents filed motions for summary judgment attacking all of CES's claims *on the merits*. [CR 25-39, 43-46] On June 8, 1987, prior to the scheduled hearing on their motions, respondents filed a request for a status conference with the court, wherein they advised that an issue regarding the statute of limitations had arisen, as well as CES's lack of capacity. This was due to the fact that the four year statute of limitations on CES's antitrust claims expired on May 6, 1987, and California law did not allow CES to obtain a retroactive reinstatement of its right to sue under such circumstances. Respondents inquired as to whether the court wished to take up the capacity/statute of limitations issues with the summary judgment motions already pending, or as a separate matter. [CR 81]

On June 8, 1987, the same day respondents requested the status conference, CES obtained a "certificate of revivor" from the California Franchise Tax Board, reinstating its corporate capacity to sue pursuant to California Revenue and Taxation Code section 23305b, "without full payment of back taxes." [Pet., p. 5, n. 1]

At the subsequent status conference, held June 15, 1987, the district court elected to take up the capacity/statute of limitations issue prior to the pending motions

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[2]The relevant provision of FRCP 17(b) reads: "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized."

for summary judgment on the merits. After permitting briefing of the issue, the court granted summary judgment in favor of respondents on the ground that CES lacked capacity to commence this action under FRCP 17(b) and did not acquire capacity to sue in federal court until after the statute of limitations expired on all of the claims asserted in the complaint. Since the reinstatement of CES's corporate powers on June 8, 1987 was *not retroactive* under California law, CES's claims were necessarily barred by the statute of limitations. [See Appendices A and B.]

The Court of Appeals affirmed both the holding and rationale of the district court. [Pet., Appendix B.][3]

Thus, while it is true CES *initially* lost its capacity to sue because of non payment of its California taxes, it was not that event which ultimately caused CES to be barred from pursuing its federal antitrust claim. *CES did not have to pay those back taxes to revive its capacity* under the procedure afforded by section 23305b. [See Appendix C, p.C3.] CES had ample time to do exactly what it did on June 8, 1987, *before* it filed its complaint on January 13, 1986, or at any time thereafter prior to May 6, 1987. It is beyond dispute that had CES done so, its antitrust claims would not have been time barred.

The petition offers no explanation as to why CES did not act in timely fashion to obtain the revived capacity needed to pursue this action. CES's corporate powers were suspended for two and one half years before the complaint was filed. The petition asserts that its

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[3]The petition does not challenge the correctness of the Court of Appeals' holding that CES's belated reinstatement of corporate capacity was not retroactive under California law. Nor would that have been an appropriate issue for review by this Court.

suspension was "unbeknownst to CES" [Petition, p. 5], but does not mention the fact that respondents pled CES's lack of capacity in their answers to the complaint. CES simply ignored that expressly alleged affirmative defense for some *fifteen months*, and has no one to blame but itself that it failed to act soon enough to prevent its suit from becoming time barred.

B. Background To Lawsuit And Relationship Of Parties.

In 1981, when the events giving rise to this lawsuit began, CES carried on an electrical contracting business, primarily in the County of Los Angeles, California. CES operated as a "union contractor" and was bound by the then current collective bargaining agreement between two of the respondents, Los Angeles County Chapter, National Electrical Contractors Association ("LA NECA") and International Brotherhood of Electrical Workers, Local Union No. 11 ("Local 11"). CES was a member of LA NECA. [SUF, CR 32, ¶¶8-10][4]

In mid 1981, CES decided to open a second office in the City of Palm Springs, California, located in the

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[4]The citation "SUF, CR 32" used herein, refers to a comprehensive "Statement of Uncontroverted Facts," submitted by several of these respondents to the district court in support of their motions for summary judgment on the merits. It was identified in the Clerk's Record on Appeal by its number on the docket sheet, 32. In accordance with the district court's local rules, each statement of fact set forth therein was fully supported by references to competent, probative evidence submitted with the motions, consisting of documents, unrefuted declarations of respondents' witnesses and sworn deposition testimony and other admissions of CES's principal officers. Most of said statements were expressly *admitted* by CES, in whole or in part, in the response which it filed. [CR 49] In any event, CES offered no competent, probative evidence to refute *any* of said statements.

County of Riverside. On June 22, 1981, it signed a lease for office space in Palm Springs to commence on August 1, 1981. [Complaint, CR 1, ¶21(c)] On July 28, 1981, CES signed a "Letter of Assent" agreeing to be bound as a signatory employer under the then current collective bargaining agreement between respondents, Southern Sierras Chapter National Electrical Contractors Association ("SS NECA") and International Brotherhood of Electrical Workers Local Union No. 440 ("Local 440"). At the same time, CES joined SS NECA as a member. [SUF, CR 32, ¶¶13-16][5]

Respondent, Southern California IBEW-NECA Pension Trust Fund ("Pension Trust Fund"), is a joint employer-employee managed employee benefit trust established in conformity with the provisions and requirements of the Labor Management Relations Act of 1947 ("LMRA"), as amended, and the Employee Retirement Income Security Act of 1974 ("ERISA"). It receives and administers contributions required to be made by employers for the purpose of providing retirement benefits for their employees under the terms of various collective bargaining agreements. [SUF, CR 32, ¶¶6, 7] CES was obligated under the LA NECA/Local 11 and SS NECA/Local 440 collective bargaining agreements to make contributions to the Pension Trust

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[5]Respondent, National Electrical Contractors Association, Inc. ("National NECA"), is a national trade association of electrical contractors. Respondents, LA NECA and SS NECA, are chartered chapters of that association, but each is a separate corporation and there is no common ownership interest among the three entities. [SUF, CR 32, ¶¶1, 5] Respondent, International Brotherhood of Electrical Workers AFL-CIO ("IBEW"), is an International Labor Union. Respondents, Local 11 and Local 440, are two of its local unions, but each is an autonomous entity. [CR 39, ¶¶2-4] National NECA and IBEW are jointly filing a separate Brief in Opposition.

Fund on behalf of its employees. [SUF, CR 32, ¶¶58-60, 62]

During the period in question, respondent, John Gomes, was a shareholder and officer of a corporation known as Industrial Electric, Inc., which was engaged in the electrical contracting business. Industrial was a member of SS NECA and its principal office was in Palm Springs. [SUF, CR 32, ¶3] Respondent, Dennis Thorson, was a shareholder and officer of a corporation known as Thorson Electric Inc., which was in the electrical contracting business and a member of SS NECA. Thorson Electric's office was located in Desert Hot Springs, California, in the County of Riverside. [SUF, CR 32, ¶4]

Under the terms of the SS NECA/Local 440 collective bargaining agreement, any disputes between signatory employers and Local 440 arising under the agreement were required to be arbitrated before a Labor-Management Committee consisting of three members representing the union and three representing employers. Gomes and Thorson frequently served as employer representatives on the Labor-Management Committee, and did so when the hereinafter described dispute between CES and Local 440 was arbitrated in 1982. [SUF, CR 32, ¶35]

C. There Is No Factual Support For CES's Claims That It Was Driven Out Of Business By Illegal Antitrust Conduct, And Thereby Denied Access To The Federal Court.

Of the three Questions Presented in the petition, the first two necessarily rest on the following premises: (1) that respondents' conduct complained of in fact violated the antitrust laws; and (2) that it was such "illegal

antitrust conduct" that drove CES out of business and caused it to have its corporate powers (including the right to sue) suspended by the State of California for non payment of taxes. From these premises, CES argues that the Ninth Circuit's application of California law to determine that CES lacked capacity to bring this action under Rule 17(b) had the effect of depriving CES "of its constitutional right of access to federal court," thereby permitting respondents "to use their own illegal conduct to shield themselves from Sherman Act liability." [Petition, Questions 1, 2; pp. 4-7, 11-12, 14]

As we will demonstrate hereinafter, the premises to CES's contentions in the petition are not supported by any facts established by competent evidence in the record below. None of the respondents violated the Sherman Act or any other federal or state law. More importantly, insofar as the issues CES seeks to present to this Court are concerned, there is not a shred of evidence to support CES's bare, conclusory allegation that it was driven out of business and rendered unable to pay its taxes as the proximate result of respondents' conduct.

1. The Provisions of The SS NECA/Local 440 Collective Bargaining Agreement Pertinent To The Dispute.

CES's antitrust claims rested on the contention that the collective bargaining agreement between SS NECA and Local 440 "operated as a barrier to entry" into the Palm Springs electrical contracting market. [Petition, p. 4] Hence, some discussion of the pertinent provisions of the agreement would seem to be helpful to an

understanding of this essential factual predicate to CES's grounds for requesting certiorari.[6]

Under the terms of the agreement, every signatory employer who had a "permanent place of business' within the jurisdiction of Local 440 (all of Riverside County) was given an 18 mile radius "free zone" around the main post office in the city in which the employer's place of business was located. A signatory employer who did not have a "permanent place of business" in the county was classified as a "traveling contractor." Traveling contractors also were given a comparable free zone, but since, by definition, they had no "permanent place of business" in the county, the center of their free zone was deemed to be the main post office in the City of Riverside. That city was the situs of Local 440's principal office and hiring hall, and a majority of its members resided there. *All* signatory employers were required to pay "travel" or "subsistence" pay to their employees, in addition to regular wages, on any jobs located outside of their free zone. If the distance from the perimeter of the free zone to the job site reached a certain maximum, the job was classified as a "subsistence job" and a flat $35 per day was required as "subsistence pay"

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[6]The petition does not discuss the provisions of the agreement at all, but instead cites to an affidavit of Donald L. Martin, an economist hired by CES to serve as an "expert." His affidavit was submitted in opposition to the respondents' motions for summary judgment on the merits. [CR 58] However, a cursory reading of the affidavit will quickly reveal that Mr. Martin's "market exclusion" theory was based solely on conjecture and generalizations. He conveniently ignored the specific uncontroverted facts discussed herein, including the actual provisions of the subject agreement.

for all employees. [SUF, CR 32, ¶¶17-19, 29; Agreement, §§2.07-2.09, 3.20, 3.21][7]

Under Section 2.08 of the agreement, a "place of business" was defined to mean "an office, shop or premises where the Employer or his designated representative can normally be reached by telephone and by personal call, and where the Employer receives his mail and conducts the ordinary tasks of operating his business." Under Section 2.07, when a "place of business" (also called a "shop") was established within Local 440's jurisdiction, it had to be *specifically recognized* as such by Local 440, and a *90 day minimum period* was expressly required for such recognition. Any dispute between the employer and Local 440 over the latter's refusal to recognize a place of business as a qualified "shop" was expressly made subject to the grievance and dispute resolution procedures set forth in the agreement—i.e., they were to be arbitrated before a Labor-Management Committee. [SUF, CR 32, ¶¶17, 32]

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[7]Respondents supported their motions for summary judgment on the merits with unrefuted evidence that travel and subsistence pay provisions similar to those described above, based on the "free zone" concept, had been in the Local 440 collective bargaining agreement for more than 20 years prior to the period in question. Over the years, SS NECA repeatedly had tried—without success—to bargain them out of the agreement, because the local electrical contractors in Riverside County did not work only in their limited free zones and they disliked having to pay extra compensation to employees on jobs located only a few miles away from their shops. [SUF, CR 32, ¶¶20, 83-92]

2. CES's Dispute With Local 440 Over The Timing Of Shop Recognition And The Decision Of The Labor-Management Committee Favoring The Union.

At the time CES became bound by the SS NECA/ Local 440 collective bargaining agreement on July 28, 1981, it already had successfully bid on a subcontract to perform electrical construction work on a project at the Indio Community Hospital in the City of Indio, a few miles from Palm Springs, and had executed a lease for its Palm Springs office. CES expected to begin the job in November and in fact started work on November 2, 1981. [SUF, CR 32, ¶¶22, 28]

It is undisputed that if CES had in fact established a qualifed "place of business" at the Palm Springs office location on August 1, 1981, the date its lease commenced, it would have met the requirements to be recognized as a local contractor with a "permanent place of business" in Palm Springs at the time work commenced on the hospital job. In that event, the job would not have been classified as a "subsistence job" *and CES would not have had to pay any subsistence pay to its employees.* [SUF, CR32, ¶¶29-31] Indeed, CES's complaint *admits* as much. [CR 1, ¶¶21(g), (h), (j).]

The genesis of this lawsuit was the dispute which arose when Local 440 contested CES's claim that it had begun using its Palm Springs office as a "shop" in time to be classified as a local contractor for the Indio Hospital job. Local 440 contended that as late as October 1981, CES still had not physically moved in, nor even installed a telephone, to establish a true "place of business" at that location within the meaning of the agreement. Local 440 refused to recognize the office as one which satisfied

the 90 day requirement when work began on the hospital job. This mean CES's free zone was required to be measured from the main post office in the City of Riverside, which was far enough away from Indio that the job had to be classified as a "subsistence job." Hence, the union insisted that CES pay its employees $35 per day for "subsistence," in addition to their regular hourly wages, for the duration of the job. [SUF, CR 32, ¶¶29-33][8]

After CES brought a grievance against Local 440 concerning the office timing issue, on March 16, 1982 the Labor-Management Committee (which included respondents Gomes and Thorson) upheld the union's contention that CES had not actually moved into the Palm Springs office before October 6, 1981, and hence that the Indio Hospital job was properly classified as a subsistence job under the agreement. [SUF, CR 32, ¶¶33-36]

CES did not accept the decision of the Labor-Management Committee, however. CES paid the required subsistence pay to its employees on the Indio Hospital job only until July 28, 1982, at which time it ceased making any further subsistence payments on the advice of its labor relations consultant. [SUF, CR 32, ¶37] This led to the NLRB litigation which is the subject of the third Question Presented in the petition. The petition does not describe it accurately. [Petition, pp. 15-16]

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[8]Under the agreement, once a job was classified as a "subsistence job," it was required to remain so classified until it was completed. [SUF, CR 32, ¶30]

3. The NLRB Decision Upholding Both The Union's Position and The Good Faith of The Labor-Management Committee.

The NLRB litigation was commenced on October 29, 1982, after Local 440 filed an unfair labor practice charge with the NLRB, alleging that CES violated Sections 8(a)(1) and (5) of the National Labor Relations Act (NLRA) by unilaterally ceasing to pay subsistence to employees on the Indio Hospital job, and by further refusing to bargain with Local 440 on that subject, in violation of the terms of their collective bargaining agreement. [SUF, CR 32, ¶¶44, 50]

The Administrative Law Judge ("ALJ") who heard the evidence made certain *key findings of fact adverse to CES* which are not mentioned in the petition, for obvious reasons. Thus, the ALJ expressly found: (a) that Local 440, *in good faith,* had concluded that CES's Palm Springs shop had not been timely established in relation to the Indio Hospital job under the collective bargaining agreement; (b) that the Labor-Management Committee, *in good faith,* had agreed with the union's position; (c) that, *in fact,* CES did not move into the office, or have a telephone in the office, until on or about October 6, 1981, and hence "did not occupy the office until some time in October 1981," i.e., less than 30 days prior to starting the Indio Hospital job; and (d) that the union had agreed CES's office was properly established for 90 days *by January 1982.* [SUF, CR 32, ¶¶52, 53; 271 NLRB 604]

Notwithstanding these factual determinations, the ALJ ruled against Local 440 on the unfair labor practice charges. He did so on the theory that CES did not violate the NLRA when it unilaterally ceased making subsist-

ence payments because those pay provisions of the agreement did not constitute a "mandatory subject of bargaining" under the NLRA. On appeal, however, the NLRB review panel *expressly reversed the ALJ on that point.* The NLRB held that such provisions called for the payment of supplemental "wages" within the meaning of the NLRA and, hence, they were not only valid, but a mandatory subject of bargaining under the NLRA. [SUF, CR 32, ¶¶54-55; 271 NLRB 599-601]

4. CES Was Not Excluded From Competition In The Palm Springs Market, Nor Was It Driven Out Of Business By Any Of The Respondents.

From the foregoing facts, it is absolutely clear that CES and its "expert," Mr. Martin, have grossly mischaracterized both the purpose and actual economic effect of the SS NECA/Local 440 collective bargaining agreement. On their face, the provisions of the agreement could not operate to exclude CES or any other new contractor from competing for business anywhere in Riverside County. *All* signatory contractors were required to pay travel or subsistence pay on jobs outside their free zones. A "traveling contractor" was treated *exactly like a local contractor* whose permanent place of business was in the City of Riverside (the biggest city in the county and situs of Local 440's office), since both had *exactly the same free zone.* Moreover, a "traveling contractor" who did not wish to have his free zone based on the main post office in the City of Riverside was free to open an office anywhere else in the county and become a "local contractor" in only 90 days.

Indeed, this entire costly lawsuit stems from the fact that CES had to pay subsistence pay to its employees

on a *single job,* which easily could have been avoided if it had simply moved into its Palm Springs office on August 1, 1981, when its lease commenced. CES never contended that it would have been unduly burdensome to do so. Rather, it insisted from the very beginning that it *did* move in on that date, though the Labor-Management Committee, ALJ and NLRB all found otherwise from the evidence presented.

Furthermore, CES's own records showed that the *total* amount of subsistence it actually paid to its employees on the Indio Hospital job, up to the time it permanently ceased making such payments, was *only $20,370.* [SUF, CR 32, ¶¶37, 99][9] CES's records and the deposition testimony of one of its officers also proved conclusively that even if it had included subsistence pay in its bid on the Indio Hospital job, it still would have been the low bidder by a *wide margin.* Based on CES's estimate of the number of hours required to perform the job, the total amount it would have included as subsistence pay in calculating its bid would have been a *mere $27,688.* [SUF, CR 32, ¶¶94-98] CES obtained that job with a low bid of $645,000, which was *$269,000 below the next lowest bid.* [SUF, CR 32, ¶¶94, 100-102] Obviously, therefore, the subsistence pay provisions of the so-called "collusive labor agreement" did not and

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[9]By the time the NLRB case was finally decided in 1984, CES was out of business and it never paid any more subsistence. [SUF, CR32, ¶8, 56, 69]

could not serve as an "entry barrier" to CES moving into the Palm Springs market.[10]

As for the *respondents who were not parties to the SS NECA Local 440 collective bargaining agreement,* CES produced no evidence that any of them did anything which even arguably violated the antitrust laws or was otherwise illegal. Nor could anything they did have caused CES to be driven out of business in Palm Springs or anywhere else.

The Pension Trust Fund was not a party to the SS NECA/Local 440 Collective Bargaining Agreement and had no connection with the subsistence pay dispute between CES and Local 440. CES's claim that the Pension Trust Fund acted to enforce those provisions of the agreement against CES is *utterly false*. The evidence conclusively proved that the Pension Trust Fund did nothing more than carry out its fiduciary obligation by attempting to collect *delinquent employee benefit contributions* which CES owed to the trust under *both* the LA NECA/Local 11 and Southern Sierras NECA/Local 440 collective bargaining agreements. [SUF, CR 32, ¶¶57-79] Indeed, CES *admitted* that in early 1983 it became delinquent in making its required fringe benefit contributions for its employees, and that it still owed money to the Pension Trust Fund at the time the IRS seized all of CES's assets on May 6, 1983.

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[10]It should be remembered that under the agreement, CES only would have had to pay subsistence on jobs in the Palm Springs area if the work commenced before its local office finally satisfied the 90 day minimum requirement in January, 1982. CES never produced a shred of competent evidence to prove that it was prevented from getting any other job during that brief period (or at any other time) as the result of being underbid by a local contractor, with subsistence pay making the difference.

[CR 1. ¶21(w); SUF, CR 32, ¶¶62, 64] In support of its motion for summary judgment on the merits, the Pension Trust Fund produced uncontroverted evidence that as of August 2, 1983 (after CES had ceased doing business) CES owed $57,617.18 in delinquent fringe benefit contributions. [SUF, CR 32, ¶¶60-63][11]

It is important to note, moreover, that CES's obligation to make pension and other fringe benefit contributions for its employees was not affected in any way by the subsistence pay dispute with Local 440. The subsistence pay constituted supplemental wages, payable directly to the employees who worked on the Indio Hospital job, and such payments did not affect the amount of contributions owed by CES for fringe benefits. The required fringe benefit contributions were based on the number of *hours* worked by employees. Furthermore, the delinquency was attributable to work performed by *all* of CES's employees on *all* of its jobs, most of which were located in Los Angeles County. [SUF, CR 32, ¶¶58, 62, 65, 68]

Respondents, Local 11 and LA NECA, are referred to in the petition as the "Los Angeles County counterparts" to Local 440 and SS NECA. (Petition, p. 4) That term is meaningless. No facts exist which connect Local 11 or LA NECA to the Southern Sierras NECA/Local 440 collective bargaining agreement or the events which occurred in Riverside County. CES's sole

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[11]Unquestionably, the trustees of an employee benefit trust fund governed by ERISA and the LMRA "have an obligation to enforce the terms of the collective bargaining agreement regarding employee fund contributions against the employer 'for the sole benefit of the beneficiaries of the fund.' " *Hawkins v. Bennett*, 704 F.2d 1157, 1159 n. 1 (9th Cir. 1983); *Huge v. Old Home Manor, Inc.*, 419 F.Supp. 1019, 1021 (W.D. Pa. 1976).

basis for naming Local 11 as a defendant was that it sought to enforce the fringe benefit provisions of *its own collective bargaining agreement* against CES, when CES admittedly became delinquent in making such contributions. [SUF, CR 32, ¶¶62, 63, 65, 66] LA NECA was included as a defendant solely because its representatives sat on the Labor-Management Committee which upheld various grievances against CES, brought by Local 11 *under the LA County agreement.* [CR 1, ¶¶21(w), (x)]

CES's sole basis for suing Gomes and Thorson and their corporations—referred to in the petition as "indigenous local contractors" (Petition, p. 4)—was that they served as management representatives on the Labor-Management Committee which upheld Local 440's position on the Palm Springs office timing dispute. In so doing, however, they were simply performing their duty to act as *independent arbitrators.*[12] Moreover, as previously shown, the ALJ and NLRB expressly found that the Committee had agreed with the union *in good faith,* and that its decision was *correct*[13]

In light of the foregoing facts, it is positively ludicrous for CES to assert in its petition to this Court that any

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[12]This method of dispute resolution is common in labor agreements and favored by the courts. Since the management and union representatives on the committee serve as independent arbitrators, they have no duty to support their respective sides in the controversy. See *Early v. Eastern Transfer,* 699 F.2d 552, 559-560 (1st Cir. 1983); *Goodwin v. Teamsters Local 150,* 113 LRRM 3029, 3032 (E.D. Cal. 1982).

[13]The NLRB's decision is binding on CES in this action under the doctrine of collateral estoppel. *Glaziers & Glassworkers v. Custom Auto Glass Distributors,* 689 F.2d 1339, 1341 (9th Cir. 1982); *Paramount Transport Systems v. Chauffeurs, Etc. Local 150,* 436 F.2d 1064 (9th Cir. 1971).

of the respondents, let alone all of them, engaged in illegal conduct under the antitrust laws, which "drove CES not only out of the Palm Springs electrical contracting market but completely out of business." [Petition, p. 4] CES's President, Gus Shouse, admitted in his deposition that when the *IRS permanently closed CES down* on May 6, 1983, it was still performing work on the Indio Hospital job. At that time, the general contractor removed CES from the job because the IRS seized all of CES's tools and other assets so that it could no longer perform its contract. This action was taken by the IRS, with the cooperation of the SBA, because CES owed approximately *$100,000* to the IRS for *unpaid withholding taxes* and *$427,044.20* to the SBA on a *defaulted SBA guaranteed loan.* [SUF, CR 32, ¶¶8, 69-71] In light of those debts, the small amounts involved in disputed subsistence pay and delinquent fringe benefits were inconsequential and clearly could not have been the cause of CES's financial demise.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE NINTH CIRCUIT'S CONSTRUCTION OF RULE 17(b) IS NEITHER IN CONFLICT WITH OTHER CIRCUITS NOR PRECLUDED BY THE SUPREMACY CLAUSE OR POLICY BEHIND THE SHERMAN ACT.

The first question presented in the petition is unfairly slanted from the start, in that it asks if FRCP 17(b) requires a federal court "to adopt a state rule of corporate capacity when to do so permits antitrust violators to use their own illegal conduct to shield them from Sherman Act liability, frustrating the basic enforcement goals of the antitrust laws?" As we have shown, the

actual facts of this case do not properly raise that question at all. Erroneous factual premises also infect CES's discussion of this question in the "Reasons For Granting Review," wherein it is argued that the Court of Appeals' "construction" of Rule 17(b) "permits state rules of procedure to frustrate the substantive policy of the Sherman Act" and, therefore, that such construction conflicts with decisions of other circuits and is precluded by "the supremacy clause" (Article VI of the Constitution). [Petition, pp. 6-12] In addition to being factually unfounded, all of these arguments are so lacking in legal support as to be utterly frivolous.

A. There Is No Conflict With Other Federal Decisions.

Although the heading to CES's first argument asserts that the Court of Appeals' construction of Rule 17(b) is "in conflict with the decisions of other circuits," CES cites no conflicting decisions. Instead, CES merely *argues* that the "fairness" and "logic" behind Rule 17(b) apply only when federal jurisdiction rests on diversity of citizenship, without citing any authority which would support that position. [Petition, pp. 6-7]

Of course, the plain language of the Rule itself—that is, the second sentence, which is the only provision pertinent to corporations—makes no distinction between diversity of citizenship and federal question jurisdic-

tion.[14] Moreover, its application was plainly intended to be *mandatory*: "The capacity of a corporation to sue or be sued *shall* be determined by the law under which it was organized." (Emphasis added)

Furthermore, numerous cases have recognized that Rule 17(b) mandates that the capacity of a corporation to sue or be sued in federal court must be determined under the law of the state of incorporation, *even when federal claims or rights are involved.* See *R.V. McGinnis Theaters v. Video Indep. Theaters, Inc.*, 386 F.2d 592, 593-595 (10th Cir. 1967), *cert. den.*, 390 U.S. 1014 (1968); *Moore v. Matthews' Book Co.*, 597 F.2d 645, 646-647 (8th Cir. 1979); *Mather Construction Co. v. United States*, 475 F.2 1152, 1154-1155 (Ct. Cl. 1973); *U.S. v. 2.61 Acres of Land*, 791 F.2d 666, 668 (9th Cir. 1985); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987). All of these cases, except *Mather Construction Co.*, were cited in the Ninth Circuit's opinion herein. Indeed, the court expressly *followed Moore* and *McGinnis*, both of which held that a corporate plaintiff lacked capacity to maintain an *antitrust* action under Rule 17(b) because of the loss of its power to sue under state law. In *McGinnis*, as here, the antitrust plaintiff's lack of capacity was caused

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[14]In contrast, the *third* sentence of Rule 17(b) expressly does make such a distinction: "In all *other* cases [i.e., other than with respect to an individual (first sentence) or corporation (second sentence)] capacity to sue or be sued shall be determined by the law of the state in which the district court is held, *except* (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name *for the purpose of enforcing for or against it a substantive right existing under the constitution or laws of the United States. . . .*" (Emphasis added)

by the suspension of its charter by the state of its incorporation, for non payment of taxes.

The petition fails even to mention these cases, which the Court of Appeals considered to be *controlling and contrary to the very argument CES is now making to this Court.* One would think that CES would make some effort either to distinguish them or suggest a reason why they were wrongly decided. But CES simply ignores them as if they did not exist, and says "[i]t is far from certain that the Rule was intended to be applied at all in a federal question lawsuit," citing two treatises for the proposition that "[l]eading commentators on the Federal Rules appear to treat Rule 17(b)'s directive as applying only in those actions brought under a federal court's diversity powers." [Petition, p. 9]

CES has completely misinterpreted these two "authorities." The short statements quoted in the petition are taken completely out of context and do not mean what CES is suggesting. Neither commentator was talking about the capacity of a corporation to sue under the *law of the state of its organization.* Rather, both were discussing the fact that there is an *additional* restriction or limitation on a corporation's ability to sue in federal court in diversity cases, based on this Court's decisions in *Angel v. Bullington,* 330 U.S. 183 (1947)

and *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949).[15]

Thus, in 3A *Moore's Federal Practice*, §17.21, pp. 17-172 to 17-174, it was observed that *Angel* and *Woods* have the effect of *modifying* Rule 17(b), in that it is *not enough* in a diversity case for a *foreign corporation* to have technical capacity under that Rule—i.e., the right to sue under the law of the state of its *own* incorporation. The corporation *also* must be able to sue under the law of the *forum* state, and "[a]ny valid law closing its courts to a foreign corporation which is not qualified to do business in the state must, therefore, be given effect in the federal courts of such state in a case based solely on diversity or alienage jurisdiction." *Id.* In proper context, then, the sentence from *Moore's* quoted by petitioner simply states the obvious limitation on this additional restriction, that it should not apply where the foreign corporation's lawsuit is based on federal substantive law.

The same distinction is made in 6 *Wright & Miller, Federal Practice and Procedure*, §1561, pp. 734-735, which states "[i]n addition to satisfying subdivision (b) [of Rule 17], the corporation also must have a right

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[15]The petition (pp. 6-7) discusses *Angel* and *Woods* but misinterprets them just as it does the two treatises. *Angel* did not involve the question of capacity at all. This Court held that when a federal court's jurisdiction rests on diversity of citizenship, the court is, in effect, only another court of the state in which it sits. Hence, the court's power is limited and it may not entertain suits that could not be brought in the state court. Based on *Angel*, this Court held in *Woods* that a foreign corporation is barred from bringing a diversity case in federal court if the law of the *forum state* would preclude the foreign corporation from suing in the state's courts because of the failure to properly qualify to do business in the state.

that is enforceable in the courts of the forum state"; but "if subject matter jurisdiction is not based upon diversity of citizenship, the federal court need not apply forum state restrictions on a corporation's ability to sue."

Nothing in *Wright & Miller, Moore's,* or the cases they cite, supports the very different proposition urged by CES, that in a non diversity case a federal court may disregard the express mandate of Rule 17(b) and entertain the suit even though the corporate plaintiff lacks capacity to sue under the law of the state in which it was organized.

Similarly wide of the mark is CES's argument that Rule 17(b) should be disregarded in the instant case under the rationale of several cases involving prisoners who were permitted to sue for violations of their federal civil rights by the state that imprisoned them, notwithstanding the fact that by virtue of such imprisonment they could not sue in the courts of that state.[16] But the policy reasons which justified that limited deviation from the *first* sentence of Rule 17(b) plainly have no application to the capacity requirement for corporations stated in the *second* sentence of the Rule. An "individual' is, of course, a natural person whose creation and existence do not stem from the law of the state of his or her domicile. Moreover, such individual continues to be a "natural person" and "citizen" of the United States within the meaning of the civil rights laws, even while in prison.

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[16]The cases referred to are cited on page 10 of the petition. Only two are appellate decisions, however: *Weller v. Dixon,* 314 F.2d 598 (9th Cir. 1963), *cert. den.,* 375 U.S. 845 (1963); *Almond v. Kent,* 459 F.2d 200 (4th Cir. 1972).

In contrast, as the Court of Appeals observed in this case, "corporations are creatures of state law" (citing *Cort v. Ash*, 422 U.S. 66, 84 (1975)). [Petition, Appendix B, p. App. 35] Indeed, as this Court recognized more than 50 years ago in *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Building Corp.*, 302 U.S. 120 (1937):

> "The decisions of this court are all to the effect that a private corporation in this country can exist only under the express law of the state or sovereignty by which it was created. Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person. There must be some statutory authority for the prolongation of its life, even for litigation purposes. (Citation)" *Id.* at 124-125
>
> . . . . . .
>
> "The power to take the long step of putting an end to the corporate existence of a state-created corporation without limitation, connotes the power to take the shorter one of putting an end to it with such limitations as the legislature sees fit to annex. (Citation) And since the federal government is powerless to resurrect a corporation which the state has put out of existence for all purposes, the conclusion seems inevitable that if the state attach qualifications to its sentence of extinction, nothing can be added to or taken from these qualifications by federal authority." *Id.* at 128.

Rule 17(b), as applied to corporations, rests squarely on this fundamental precept of corporate existence. A corporation which has ceased to exist under the law

of the state of its incorporation cannot be considered to exist for the purpose of bringing suit in federal court, regardless of the alleged basis for federal jurisdiction. Indeed, in *R.V. McGinnis Theaters & Pay T.V. v. Video Indep. Theaters, supra,* the Tenth Circuit based its holding squarely on *Chicago Title & Trust Co.,* as well as Rule 17(b), when it dismissed the suspended corporate plaintiff's antitrust suit.

None of the other cases cited by CES is even remotely relevant to the corporate capacity issue presented here. Accordingly, CES has not demonstrated that the decision below is in conflict with any other federal decision, and that alleged ground for certiorari does not exist.

B. No Important Federal Question Is Presented.

Equally lacking in merit is CES's contention that the Ninth Circuit's construction of Rule 17(b) is precluded by the supremacy clause and frustrates antitrust policy. This entire argument rests on faulty factual and legal premises, as we have demonstrated. Rule 17(b) establishes a *federal* rule of capacity for corporations and cannot violate the supremacy clause. It merely adopts the law of the state of incorporation as the federal rule because a corporation exists only by the grace of state law.

Nor was antitrust policy frustrated by the result below. CES was prevented from pursuing its antitrust claim because it allowed its own corporate existence to lapse, just as was true in *McGinnis, supra.* CES's contention that the result here had the effect of rewarding respondents for being successful with their alleged anti-competitive conduct is pure nonsense. Even if respondents had driven CES out of business as alleged, CES

still could very easily have maintained its corporate life for the purpose of bringing this action, without having to pay the taxes it says it was rendered incapable of paying, by simply making a timely application for revivor under Revenue and Taxation Code Section 23305b. The door to the federal courts became permanently closed only because CES foolishly ignored the defense of lack of capacity alleged by respondents, and slept on its rights until it was too late.

Accordingly, this case not only was correctly decided it turned on its own peculiar facts which are highly unlikely to occur with any frequency. Presumably, other corporate plaintiffs with antitrust claims will be more prudent about taking the minimal steps required to preserve their capacity to sue. Nothing presented here requires the intervention of this Court to protect "the substantive goals of antitrust law."

II.

THERE WAS NO VIOLATION OF DUE PROCESS.

By its second Question Presented, CES argues that it was denied its constitutional right of access to federal court, in violation of the due process clauses of the Fifth and Fourteenth Amendments. [Petition, pp. 12-14] It should be noted, however, that the Court of Appeals *declined to address* CES's due process claim on the ground that it had not been properly raised in the trial court. [Petition, Appendix B, p. App. 40] For the same reason, it should be disregarded by this Court.

In any event, the claim is patently lacking in merit. Contrary to CES's claim, California law does not "bar a class of litigants from seeking a federal remedy for violation of their federal rights." [Petition, p. 12]

California Revenue and Taxation Code Section 23305b provided CES with the means of preserving its capacity to pursue its antitrust claims. CES was barred from court by its own negligence.

III.

THE COURT OF APPEALS CORRECTLY DECIDED THAT THE STATUTE OF LIMITATIONS WAS NOT TOLLED BY THE NLRB PROCEEDING.

CES's last Question Presented is based on its argument that the statute of limitations on the antitrust claims should have been tolled during the NLRB litigation between CES and Local 440. [Petition, pp. 15-17] That argument was expressly and correctly rejected by the Court of Appeals. [Petition, pp. App. 39-40]

It is true that respondents contend the subsistence pay provisions of the Southern Sierras NECA/Local 440 collective bargaining agreement fall squarely within the so-called non statutory labor exemption from the antitrust laws. This follows because, (1) the claimed restraint on trade affected only signatories to the collective bargaining agreement; (2) it involved a "mandatory subject of bargaining" under the NLRA (wages); and (3) the agreement was the product of bona fide arms' length bargaining. *Continental Maritime v. Pacific Coast Metal Trades,* 817 F.2d 1391, 1393 (9th Cir. 1987); *Mackey v. National Football League,* 543 F.2d 606, 614 (8th Cir. 1976). It is not true, however, that the NLRB had "primary jurisdiction" over the issue of whether the subsistence pay provisions constituted a mandatory subject of bargaining. More importantly, the NLRB certainly did not have primary jurisdiction over the question of whether the nonstatutory labor exemption should be applied here. As the Court of

Appeals said, the courts are perfectly capable of deciding that question by themselves. [Pet., p. App. 40]

Hence, there was no need to stay the bringing of the antitrust suit while the NLRB case was pending. Indeed, as we have seen, CES brought the instant action *despite* the fact that the NLRB had determined that the disputed pay provisions constituted a mandatory subject of bargaining.

For these reasons, the Court of Appeal's decision on this issue is not in conflict with this Court's decision in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973). The factors which supported a stay of the lawsuit in favor of administrative action in that case are not present here.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC., Plaintiff,	)	CASE CV 86-0254 RSWL (MCx)

APPENDIX A

vs.	)	ORDER
NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., a corporation, etc., et al.,	)	GRANTING SUMMARY JUDGMENT
Defendants.	)	

This matter came regularly before the Court, the Honorable Ronald S.W. Lew, United States District Judge, presiding, on July 27, 1987, pursuant to an Order to Show Cause issued by the Court on June 15, 1987. All parties appeared and were represented by counsel of record.

The Court's Order to Show Cause was issued at the conclusion of a Status Conference held on June 15, 1987, which Status Conference had been requested by the defendants. Defendants requested said Status Conference for the purpose of raising certain issues concerning the claimed lack of capacity of the plaintiff to bring and pursue this action and the claimed expiration of the statute of limitations on plaintiff's claims by reason of such lack of capacity. The Court's Order to Show Cause afforded the plaintiff and defendants an opportunity to present their evidence and arguments concerning those issues and all of the parties submitted papers on the subject.

The Court has determined that the issues presented by the papers submitted by the parties should be considered as the equivalent of a motion for summary judgment by the defendants under Rule 56(b) of the Federal Rules of Civil Procedure, and opposition thereto by the plaintiff. Accordingly, the Court has given full consideration to the papers submitted by the parties under the standards prescribed for such motions under Rule 56 and, after hearing the arguments of counsel and being fully advised, IT IS HEREBY ORDERED as follows:

1. The Court finds that the following facts are uncontested:

a. The latest date on which the statute of limitations commenced to run with respect to any of plaintiff's claims asserted in this action is May 6, 1983, the date on which plaintiff ceased doing business allegedly as the result of the defendants' conduct.

b. Plaintiff's corporate powers, rights and privileges were suspended by the California Franchise Tax Board pursuant to the provisions of Sections 23301 and 23302 of the California Revenue and Taxation Code on July 1, 1983.

c. The Complaint in the instant action was filed by plaintiff on January 13, 1986, at which time plaintiff's corporate powers, rights and privileges remained suspended.

d. Unless tolled by the filing of the Complaint or for some other reason, the four year statute of limitations applicable to plaintiff's antitrust claims (15 U.S.C. §15b) expired on May 6, 1987, and the various statute of limitations applicable to all of plaintiff's other claims expired either on or before that date.

e. Following the suspension of its corporate powers, rights and privileges on July 1, 1983, such suspension remained in effect at all times until June 8, 1987. On June 8, 1987, effective that date, the California Franchise Tax Board issued a Certificate of Relief from Suspension or Forfeiture which revived plaintiff's corporate powers, rights and

privileges, with such revivor limited to court action only.

2. The Court concludes that the governing rule of law is that the revivor of plaintiff's corporate powers, rights and privileges on June 8, 1987 was not retroactive for purposes of preventing the statute of limitations from continuing to run on all of plaintiff's claims in this action during the period of plaintiff's suspension. This rule is mandated by the decision of the California Court of Appeal in the case of *Welco Construction, Inc. v. Modulux, Inc.* (1975) 47 Cal.App.3d 69, and California Revenue and Taxation Code Section 23305a which was interpreted by the court in that decision. The Court has determined that the *Welco* decision represents the law of California and is applicable and controlling in this action by virtue of Rule 17(b) of the Federal Rules of Civil Procedure.

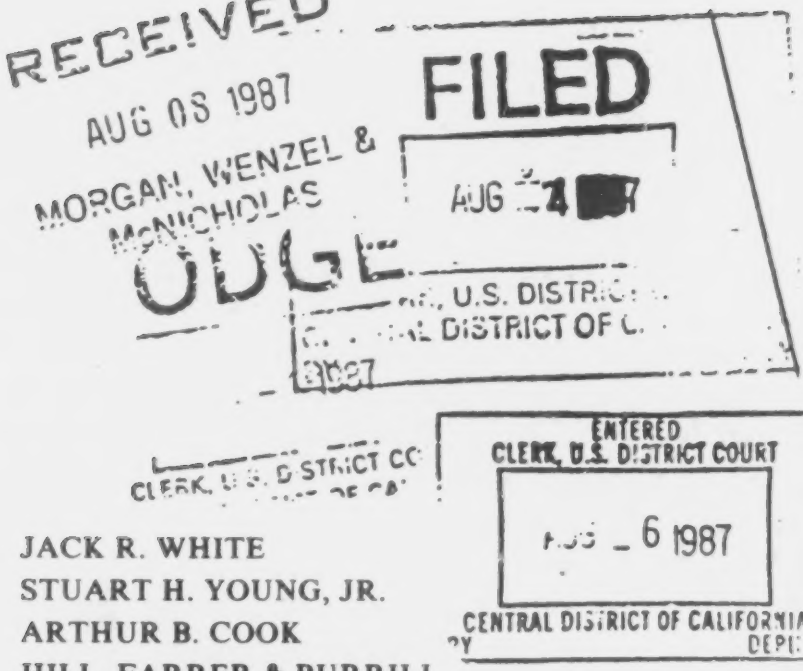
3. The Court further concludes that the statute of limitations was not tolled with respect to any of plaintiff's claims asserted in this action during the pendency of the National Labor Relations Board proceeding between plaintiff and defendant International Brotherhood of Electrical Workers Local Union No. 440, as contended by plaintiff.

4. By reason of the foregoing, each of the claims asserted by plaintiff in this action became barred by the statute of limitations applicable thereto on May 6, 1987, if not sooner. Accordingly, there is no genuine issue as to any material fact and defendants are entitled to a judgment as a matter of law pursuant to Federal Rule of Civil Procedure 56. Summary judgment is hereby granted to defendants, dismissing plaintiff's complaint in its entirety.

Dated: 8-4-87

RONALD S. W. LEW

RONALD S.W. LEW
UNITED STATES DISTRICT
COURT JUDGE



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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC., Plaintiff, vs.	CASE CV 86-0254 RSWL (MCx) JUDGMENT

APPENDIX B

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., a corporation, etc., et al.,
Defendants.

This matter came regularly before the Court, the Honorable Ronald S.W. Lew, United States District Judge, presiding, on July 27, 1987, pursuant to an Order to Show Cause issued by the Court on June 15, 1987. All parties appeared and were represented by counsel of record. The Court, after being fully advised and having granted summary judgment in favor of defendants and against plaintiff pursuant to Federal Rule of Civil Procedure 56, and having now executed a separate, formal written Order Granting Summary Judgment setting forth the reasons therefor,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That defendants, National Electrical Contractors Association, Inc., Southern California IBEW-NECA Pension Trust Fund, Southern Sierras Chapter, National Electrical Contractors Association, Los Angeles County Chapter, National Electrical Contractors Association, John Gomes, Individually and dba Industrial Electric, Inc., Dennis Thorson, Individually and dba Thorson Electric, Inc., International Brotherhood of Electrical Workers, AFL-CIO, International Brotherhood of Electrical Workers Local Union No. 11 and International Brotherhood of Electrical Workers Local Union No. 440, and each of them, shall have judgment in their favor and against plaintiff, Community Electric Service of Los Angeles, Inc., on each and all of the claims asserted in plaintiff's complaint herein on the ground that each of said claims is barred by the applicable statute of limitations. Said complaint is hereby dismissed in its entirety and plaintiff shall recover nothing thereunder.

2. Defendants shall recover costs from plaintiff as taxed by the Clerk of the Court. ~~in the amount of~~ $ RSWL

Dated: 8-4-87

RONALD S. W. LEW

RONALD S.W. LEW
UNITED STATES DISTRICT
COURT JUDGE

SUBMITTED BY:

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STUART H. YOUNG, JR.
ARTHUR B. COOK
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REVENUE AND TAXATION CODE

Section 23301. Delinquency; suspension or forfeiture of corporate powers, etc.

Except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name, the corporate powers, rights and privileges of a domestic taxpayer, may be suspended, and the exercise of the corporate powers, rights and privileges of a foreign taxpayer in this state may be forfeited if any of the following conditions occur:

(a) If any tax, penalty or interest, or any portion thereof, which is due and payable either at the time the return is required to be filed, or on or before the 15th day of the ninth month following the close of the income year, is not paid on or before 6 p.m. on the last day of the 12th month after the close of the income year, or

(b) If any tax, penalty or interest, or any portion thereof, due and payable upon notice and demand from the Franchise Tax Board, or due and payable under Section 25936, is not paid on or before 6 o'clock p.m. on the last day of the 11th month following the due date of said tax.

Section 23303. Notice of delinquency to Secretary of State; effective date of suspension or forfeiture; certificate as prima facie evidence.

The Franchise Tax Board shall transmit the names of taxpayers to the Secretary of State as to which the suspension or forfeiture provisions of Section 23301, 23301.5 or 23775 are or become applicable, and the

suspension or forfeiture therein provided for shall thereupon become effective and the certificate of the Secretary of State shall be prima facie evidence of such suspension or forfeiture.

Section 23305. Relief from suspension or forfeiture; application; payment; certificate of revivor.

Any taxpayer which has suffered the suspension or forfeiture provided for in Section 23301 or Section 23301.5 may be relieved therefrom upon making application therefor in writing to the Franchise Tax Board and upon payment of the tax and the interest and penalties for nonpayment of which the suspension or forfeiture occurred, together with all other taxes, deficiencies, interest and penalties due under this part, and upon the issuance by the Franchise Tax Board of a certificate of revivor. Application for such certificate on behalf of any domestic bank or corporation which has suffered such suspension may be made by any stockholder or creditor, by a majority of the surviving trustees or directors thereof, by any officer, or by any other person who has interest in the relief from suspension. Application for such certificate may be made by any foreign bank or corporation which has suffered such forfeiture, by any stockholder or creditor thereof, by an officer, or by any other person who has interest in the relief from forfeiture.

Section 23305a. Certificate of revivor; clearance of corporate name; reinstatement; prima facie evidence.

Before such certificate of revivor is issues by the Franchise Tax Board, it shall obtain from the Secretary of State an endorsement upon such application of the fact that the name of the taxpayer then meets the

requirements of subdivision (b) of Section 201 of the Corporations Code in the case of a domestic bank or corporation or of subdivision (b) of Section 2106 of the Corporations Code in the case of a foreign corporation. The reference to amendment of the articles of incorporation to set forth a new name contained in Sections 23301, 23301.5 and 23775 includes in the case of a foreign corporation the filing of an amended statement and designation to set forth its new name or to set forth an assumed name under subdivision (b) of Section 2106 of the Corporations Code. Upon the issuance of such certificate by the Franchise Tax Board the taxpayer therein named shall become reinstated but such reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture. The certificate of revivor shall be prima facie evidence of such reinstatement and such certificate may be recorded in the office of the county recorder of any county of this state.

Section 23305b. Revivor of corporation without full payment of taxes, penalty and interest.

Notwithstanding the provisions of Section 23305, the Franchise Tax Board may revive a corporation to good standing without full payment of the taxes, penalties and interest due if it determines that the revivor will improve the prospects for collection of the full amount due. Such revivor may be limited as to time or may limit the functions the revived corporation can perform, or both. The corporate powers, rights and privileges may again be suspended or forfeited if the Franchise Tax Board determines that the prospects for collection of the full amount due have not been improved by the revivor of the corporation.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on September 8, 1989, I served the within *Respondents' Brief in Opposition* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(By Express Mail: original and forty copies)

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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 8, 1989, at Los Angeles, California.

Betty J. Malloy
(Original signed)